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SIGMA GLOVE INDUSTRIES SDN BHD & ORS v. ONG CHIN KOK & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
WONG KIAN KHEONG JC
[CIVIL SUIT NO: WA-22IP-22-05-2017]
B 7 DECEMBER 2017

CIVIL PROCEDURE: *Anton Piller – Interlocutory injunction – Application for – Whether material facts should be disclosed in ex parte Anton Piller application – Failure to specify confidential information to prove tort of breach of confidence – Plaintiffs chose not to enter defendants' premises to search for and seize relevant evidence despite obtaining ex parte Anton Piller order – Whether granting an inter partes Anton Piller order would be unjust when plaintiffs did not execute ex parte Anton Piller order – Whether plaintiffs entitled to interlocutory mandatory injunctions – Whether ex parte Anton Piller order ought to be set aside*

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CIVIL PROCEDURE: *Costs – Award of costs – Whether court has discretion to deprive winning party of costs of suit or application – First defendant had given untrue excuses for leaving employment – Whether such conduct has severe and adverse legal consequences – Rules of Court 2012, O. 59 rr. 2(2), 3(1), (2), 8(6) & 21*

E

CIVIL PROCEDURE: *Suit – Leave to discontinue – Application for – Whether made in good faith – Whether filed with ulterior motive or improper purpose – Whether parties would suffer injustice – Rules of Court 2012, O. 21 r. 3(1)*

The three plaintiff companies ('plaintiffs') obtained an *ex parte Anton Piller*
F order ('*ex parte* APO') against the two defendants ('defendants'). The plaintiffs and plaintiffs' group produced, among others, medical, high risk, 'cleanroom' and sterile gloves. The first defendant had joined the first plaintiff as its technical manager and executed the following agreements, letter of employment ('employment contract') and 'confidentiality and non
G disclosure agreement'. Over the past years, the plaintiffs and plaintiffs' group had developed two new glove products ('new products'). The first defendant was closely involved in developing and helping to provide formula for the new products, and thus had knowledge and direct access to confidential information. Subsequently, the first defendant tendered his resignation letter
H and gave the reason that he resigned due to health problems and was considering the possibility of joining his relative in a wire trunking business. The plaintiffs, however, found out that the first defendant was planning to join the second defendant, a company involved in the business of manufacture and sale of gloves, a direct competitor of the plaintiffs and the plaintiffs' group. The plaintiffs therefore applied for and obtained the
I *ex parte* APO which provided for, among others, the defendants to allow the plaintiffs and the supervising solicitors to enter and search the premises of the first defendant and the second defendant's registered address, business

address and manufacturing plants for evidence relevant to this case and to seize such evidence. According to the supervising solicitors' affidavits, the first defendant had handed over, among others, his mobile phone and laptop and the second defendant had handed over a copy of emails and WhatsApp messages between the first and second defendants. The supervising solicitors did not enter and search the first defendant's premises or the second defendant's premises. The judgment herein concerned four applications (i) the plaintiffs' application (encl. 4) for an *inter partes* APO and an *inter partes* interlocutory mandatory injunction to compel the first defendant to deliver to the plaintiffs all confidential information belonging to the plaintiffs, to compel the first defendant to disclose to the plaintiffs certain information regarding communication between the first defendant and second defendant and to restrain the defendants from disclosing and publishing confidential information pending disposal of this suit; (ii) the second defendant applied *via* encl. 15 to set aside the *ex parte* APO; (iii) the first defendant applied *via* encl. 21 to set aside the *ex parte* APO and (iv) after the hearing of encls. 4, 15 and 21, the court had allowed encls. 15 and 21, hence the *ex parte* APO was set aside and encl. 4 was dismissed. The plaintiffs subsequently applied in court *via* encl. 100 to discontinue this suit against the second defendant. The above four applications raised the following issues (i) whether the plaintiffs had failed to disclose material facts in obtaining the *ex parte* APO; (ii) whether the *ex parte* APO should be set aside due to, among others, the plaintiffs' failure to specify the confidential information; (iii) whether the court could grant an *inter partes* APO when the plaintiffs did not execute the *ex parte* APO by entering the defendants' premises to search for and to seize evidence relevant to the case; (iv) whether the plaintiffs were entitled to an interlocutory injunction to restrain the defendants from, among others, divulging and disseminating the confidential information; (v) whether the court should exercise its discretion under O. 59 rr. 2(2), 3(1), (2), 8(b) and 21 of the Rules of Court 2012 ('RC 2012') to deprive the first defendant of the costs of encls. 4 and 21 because the first defendant had lied to the first plaintiff company regarding his reasons for leaving his employment; and (vi) when a plaintiff applied for leave of the court to discontinue an action under O. 21 r. 3(1) of the RC 2012, how should the court exercise its discretion to grant leave and if leave was given, should the court impose certain terms.

Held (allowing encls. 15 & 21 and 100; dismissing encl. 4)

(1) Whether a material fact should be disclosed by a plaintiff in an *ex parte* APO application depends on an objective test of whether the court should consider such a fact in deciding whether to give an *ex parte* APO or not. The first defendant had contended that the plaintiffs had failed to disclose the following two material facts in obtaining the *ex parte* APO (i) the first defendant had sent a WhatsApp message to one Foo stating that he will uphold his integrity; and (ii) by way of an email, the plaintiffs had allowed the first defendant's early release request. Based

A on an objective assessment, the court should consider the two facts when deciding whether to give the *ex parte* APO in this case. Accordingly, the two facts were material herein and the plaintiffs should have disclosed the two facts to this court in their application for the *ex parte* APO. (paras 8-10)

B **(2)** For a plaintiff to prove a tort of breach of confidence, the plaintiff has to specify the confidential information in question. All the plaintiffs' causes of action against both defendants depended on the contents of the confidential information. The plaintiffs were also required to specify the confidential information so as to enable the defendants to prepare their C defence against this action. The statement of claim and the plaintiffs' affidavit in support of the *ex parte* APO application herein did not specify the contents of the confidential information. There was no evidence before this court regarding the contents of the confidential information. Accordingly, the plaintiffs failed to satisfy the extremely strong *prima* D *facie* case requirement and on this ground alone, the *ex parte* APO ought to be set aside. (paras 13-16)

(3) Despite obtaining the *ex parte* APO, the plaintiffs had chosen not to enter the defendants' premises to search for and to seize relevant evidence. By their own conduct, the plaintiffs admitted that there was no real E possibility of the defendants destroying and/or concealing relevant evidence. If this court were to grant an *inter partes* APO, its effect would be wholly disproportionate to its legitimate object. Firstly, an *inter partes* APO would enable the plaintiffs to embark on a 'fishing expedition' to obtain evidence to bolster this suit when the plaintiffs had failed to F specify the confidential information and had chosen not to enter the defendants' premises to search for and to seize relevant evidence. Secondly, the second defendant had its own trade secrets and other confidential information. An *inter partes* APO may be unjust to the second defendant by compelling the second defendant to disclose its own G confidential information to its competitors. Hence, the plaintiffs failed to satisfy the court of an unusually strong and clear case against the first defendant which would entitle the plaintiffs to the interlocutory mandatory injunctions (paras 20-22)

(4) This court exercised its discretion under O. 59 rr. 2(1), 3(1), (2), 8(b) H and 21 of the RC 2012 to deprive the first defendant of the costs of encls. 4 and 21 although he had succeeded in respect of the said enclosures. This was due to the first defendant's conduct in lying, not once but twice, to one Prabha and one Foo regarding his reasons for leaving the first plaintiff. The first defendant had the right not to give I any reason for his resignation but if he chose to give reasons for leaving the first plaintiff, he should not have given untrue reasons. In accordance with O. 59 rr. 16 and 21 of the RC 2012, the court ordered the plaintiffs to pay RM50,000 to the second defendant as costs for encls. 4 and 15. (paras 29 & 30)

(5) Regarding encl. 100, this court exercised its discretion under O. 21 r. 3(1) of the RC 2012 to grant leave to discontinue because the said encl. 100 had been made in good faith. There was no evidence adduced by the second defendant to show that encl. 100 had been filed with an ulterior motive or an improper purpose to obtain a collateral advantage *vis a vis* the second defendant. The second defendant would not suffer any injustice if leave to discontinue was granted. Further, this action against the second defendant was not at an advanced stage and the second defendant did not object to the granting of leave to discontinue. (para 34)

(6) An employee has the right to resign from his or her employment. An employee also has the right to give reasons or may even opt to remain silent on why he or she has resigned. If an employee however gives an untrue excuse for leaving his or her employment, such a conduct may have severe and adverse legal consequences. Hence, the first defendant in this case should be admonished (in terms of deprivation of costs) for giving less than honest answers for his resignation. (para 37)

Case(s) referred to:

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors [1995] 1 CLJ 461 SC ***(refd)***

Anton Piller KG v. Manufacturing Processes Ltd & Ors [1976] 1 All ER 779 ***(refd)***

Apparatech (M) Sdn Bhd v. Ng Hock Chong & Anor [2006] 1 CLJ 60 HC ***(refd)***

Arthur Anderson & Co v. Interfood Sdn Bhd [2005] 2 CLJ 889 CA ***(refd)***

Asian Corporate Services (SEA) Pte Ltd v. Eastwest Management Ltd (Singapore Branch) [2006] 1 SLR 901 ***(refd)***

Aspatra Sdn Bhd & Ors v. Bank Bumiputra (M) Bhd & Anor [1987] 2 CLJ 377; [1987] CLJ (Rep) 50 SC ***(refd)***

BP Singapore Pte Ltd v. Quek Chin Thean & Ors [2010] SGHC 358 ***(refd)***

Brink's-Mat Ltd v. Elcombe & Ors [1988] 3 All ER 188 ***(refd)***

Chin Wai Hong & Anor v. Lim Guan Hoe & Anor [2014] 1 LNS 859 HC ***(refd)***

China Road & Bridge Corporation & Anor v. DCX Technologies Sdn Bhd [2014] 7 CLJ 644 CA ***(refd)***

Coco v. AN Clark (Engineers) Ltd [1969] RPC 41 ***(refd)***

Dynacast (Melaka) Sdn Bhd & Ors v. Vision Cast Sdn Bhd & Anor [2016] 6 CLJ 176 FC ***(refd)***

Ganesh Raja Nagaiah & Ors v. NR Rubber Industries Sdn Bhd [2017] 4 CLJ 420 CA ***(refd)***

Hanhyo Sdn Bhd v. Marplan Sdn Bhd & Ors [1991] 3 CLJ 1783; [1991] 2 CLJ (Rep) 684 HC ***(refd)***

Hongkong & Shanghai Banking Corp v. Timor Electric Cable & Wire Sdn Bhd & Ors [1991] 3 CLJ 1794; [1991] 2 CLJ (Rep) 728 HC ***(refd)***

Karuppannan Chellapan v. Balakrishnen Subban [1994] 4 CLJ 479 FC ***(refd)***

La Kaffa International Co Ltd v. Loob Holdings Sdn Bhd [2017] 6 MLRH 33 ***(refd)***

Lian Keow Sdn Bhd v. C Paramjothy & Anor [1981] 1 LNS 26 HC ***(refd)***

Majlis Peguam Malaysia & Ors v. Raja Segaran S Krishnan [2002] 3 CLJ 370 CA ***(refd)***

Newlake Development Sdn Bhd v. Zenith Delight Sdn Bhd & Ors [2017] 1 LNS 527 CA ***(refd)***

Ng Hee Thoong & Anor v. Public Bank Bhd [2000] 1 CLJ 503 CA ***(refd)***

Overseas Union Finance Ltd v. Lim Joo Chong [1971] 1 LNS 101 HC ***(refd)***

Pentamaster Instrumentation Sdn Bhd v. QAV Technologies Sdn Bhd & Ors [2017] 5 CLJ 736 HC ***(refd)***

A *The Vasiliy Golovnin [2008] 4 SLR 994* ***(refd)***
Tinta Press Sdn Bhd v. Bank Islam (M) Bhd [1987] 1 CLJ 447; [1987] CLJ (Rep) 396 SC ***(refd)***
United Asian Bank Bhd v. Balakrishnan Thanakodi & Ors [1992] 1 CLJ 522; [1992] 3 CLJ (Rep) 742 HC ***(refd)***

B **Legislation referred to:**
Courts of Judicature Act 1964, s. 25(2), Schedule para 6
Rules of Court 2012, O. 1A, O. 2 r. 1(1), (3), O. 3 r. 5(1), O. 21 r. 3(1), O. 29 rr. 1(1), (2), (2A)(a), (b), (c), (d), (e), (f), (g), 2, O. 59 rr. 2(2), 3(1), (2), 7(2), 8(b), 16(1)(a), (b), (e), 21, 22
Specific Relief Act 1950, s. 51(1)

C *For the plaintiffs - Gideon Tan, Brian Ernest Cumming, Teo Qing Qing & Khong Jo Ee; M/s Gideon Tan Razali Zaini*
For the 1st defendant - Wendy Lam Mei Kwan, Himahlini Ramalingam, Wong Jia Ee & Ong Yan Hao; M/s Himahlini & Loh
For the 2nd defendant - Ambiga Sreenevasan, S Sivaneindiren, Janini Rajeswaran, Jeff Ong Sze Ren & Lim Wei Jiet; M/s Cheah Teh & Su
D

Reported by Suhainah Wahiduddin

JUDGMENT

(Court Encl. Nos. 4, 15, 21 and 100)

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Wong Kian Kheong JC:

Introduction

[1] The three plaintiff companies (plaintiffs) have obtained an *ex parte Anton Piller* order (*ex parte* APO) against the two defendants (defendants).
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[2] This judgment concerns the following four applications:

(i) the plaintiffs' application in court encl. no. 4 (encl. 4) for the following orders:

G (a) an *inter partes* APO;

(b) an *inter partes* interlocutory mandatory injunction to compel the first defendant (first defendant) to deliver to the plaintiffs, among others, all confidential information (confidential information) which belongs to the plaintiffs and their group of companies (plaintiffs' group);
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(c) an *inter partes* interlocutory mandatory injunction to compel the first defendant to disclose to the plaintiffs' solicitors by way of an affidavit, among others, certain information regarding communication between first defendant and second defendant company (second defendant); and
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(d) an *inter partes* interlocutory injunction to restrain the defendants from, among others, disclosing, divulging, using, communicating, disseminating and publishing the confidential information pending the disposal of this suit;

(ii) the second defendant applied in court encl. no. 15 (encl. 15) to set aside the *ex parte* APO;

(iii) court encl. no. 21 (encl. 21) is the first defendant's application to set aside the *ex parte* APO; and

(iv) after the hearing of encl. 4, 15 and 21 (three applications), this court, among others:

(a) allowed encls. 15 and 21. Hence, the *ex parte* APO was set aside; and

(b) dismissed encl. 4.

The plaintiffs subsequently applied in court encl. no. 100 to discontinue this suit against the second defendant (encl. 100).

[3] The above four applications raise the following issues, among others:

(i) whether the *ex parte* APO should be set aside due to, among others, the plaintiffs' failure to specify the confidential information;

(ii) should the court grant an *inter partes* APO when, among others, the plaintiffs did not execute the *ex parte* APO by entering the defendants' premises to search for and to seize evidence relevant to this case?;

(iii) whether the plaintiffs were entitled to an interlocutory injunction to restrain the first defendant from, among others, disclosing, divulging, using, communicating, disseminating and publishing the confidential information pending the disposal of this action;

(iv) whether the court should exercise its discretion under O. 59 rr. 2(2), 3(1), (2), 8(b) and 21 of the Rules of Court 2012 (RC) to deprive the first defendant of the costs of encl. 4 and 21 because the first defendant had lied to his employer, the first plaintiff company (first plaintiff), regarding his reasons for leaving his employment; and

(v) when a plaintiff applies for leave of the court to discontinue an action under O. 21 r. 3(1) RC, how should the court exercise its discretion to grant leave and if leave is given, should the court impose certain terms?

Background

[4] The statement of claim in this case (SOC) pleaded as follows, among others:

(i) the second plaintiff company (second plaintiff) is the holding company of the first plaintiff while the third plaintiff company (third plaintiff) is "affiliated" with the first plaintiff. The plaintiffs and plaintiffs' group produce, among others, medical, high risk, "cleanroom" and sterile gloves;

(ii) on or about 1 August 2012, the first defendant joined the first plaintiff as its technical manager. The first defendant had executed the following agreements:

(a) letter of employment dated 13 June 2012 with the first plaintiff (employment contract); and

(b) "Confidentiality and non-disclosure agreement" dated 27 March 2013 (CNDA) with Platinum Glove Industries Sdn Bhd (PGISB). PGISB is a wholly-owned subsidiary of the second plaintiff;

(iii) the second defendant is a public listed company which is involved in, among others, the business of manufacture and sale of gloves;

(iv) over the past four years, the plaintiffs and plaintiffs' group have invested approximately RM9,878,468.17 to develop two new glove products (new products), namely:

(a) "S Series" gloves made of nitrile, chloroprene and other synthetic materials; and

(b) chloroprene-based "C Series" gloves.

The confidential information consists of, among others, trade secrets, formulas, processes, inventions, designs, know-how discoveries, technical specifications and information regarding the new products;

(v) the first defendant was the second highest ranking person in the Research and Development Department of the plaintiffs and plaintiffs' group (R&D Dept). Mr Prabha is the Assistant General Manager and head of the R&D Dept (Mr Prabha). In the course of the first defendant's employment, among others:

(a) the first defendant was closely involved in developing the new products;

(b) the first defendant helped to provide the formulas of the new products;

(c) the first defendant was involved in monitoring the manufacturing of the new products to ensure that the new products met the necessary standards and complied with technical and regulatory specifications; and

(d) the first defendant had knowledge and direct access to the confidential information;

(vi) on or about 22 March 2017, the first defendant tendered his resignation letter. The first defendant requested for an early release from the four-month period provided in the employment contract (early release request). The first defendant informed Mr Prabha that he resigned due

to health reasons (a need to reduce his work stress level) and he was considering the possibility of joining his relative in a wire trunking business (first defendant's reasons). The first defendant did not indicate that he would be joining a competitor of the plaintiffs and plaintiffs' group;

(vii) due to the first defendant's important role in the R&D Dept, Mr Foo Khon Pu, the plaintiffs' Chief Executive Officer and Managing Director (Mr Foo), spoke to the first defendant on or about April 2017. The first defendant's reasons were also given to Mr Foo. Mr Foo suggested for the first defendant to be transferred to the plaintiffs' marketing and production department if he wanted a less stressful work environment. The first defendant rejected this suggestion. Upon further query by Mr Foo, the first defendant stated that he was considering to join a chemical dispersion company; and

(viii) on or about the end of April 2017, the plaintiffs found out that the first defendant would join the second defendant, a competitor of the plaintiffs and plaintiffs' group. The second defendant does not have any glove product which is similar to the new products. The plaintiffs and plaintiffs' group are the only companies which have manufactured the new products.

[5] The plaintiffs applied for and obtained the *ex parte* APO which provided for, among others, the defendants to allow the plaintiffs and the supervising solicitors to enter and search:

(1) three premises of the first defendant (first defendant's premises); and

(2) the second defendant's registered address, business address and manufacturing plants (second defendant's premises)

- for evidence which is relevant to this case and to seize such evidence.

[6] According to the supervising solicitors' affidavits, among others:

(1) the first defendant handed over to the supervising solicitor his mobile phone, "USB Flash Drives", external hard drives, laptop (owned by the plaintiffs) and "tablet". The plaintiffs' representatives and solicitors together with the supervising solicitors did not enter and search the first defendant's premises; and

(2) the plaintiffs' representatives and solicitors together with a supervising solicitor went to the second defendant's premises. The second defendant handed to the supervising solicitor, among others, a copy of emails and WhatsApp messages between the first and second defendants. The second defendant's premises were not searched by the plaintiffs' representatives and solicitors in the presence of the supervising solicitors.

A ***Ex Parte* APO**

[7] My understanding of the relevant cases and provisions of written law regarding *ex parte* APO, is as follows:

(1) the original purpose of an *ex parte* APO is to enable a party to preserve
B evidence which is relevant to a suit (relevant evidence) so that in the interest of justice, the relevant evidence may be subsequently adduced in the suit - please see Lord Denning MR's judgment in the English Court of Appeal in *Anton Piller KG v. Manufacturing Processes Ltd & Ors* [1976] 1 All ER 779, at 783. *Anton Piller* has been followed by our
C appellate courts as follows:

(a) the majority judgment of the Supreme Court delivered by Mohd Azmi SCJ in *Aspatra Sdn Bhd & Ors v. Bank Bumiputra (M) Bhd & Anor* [1987] 2 CLJ 377; [1987] CLJ (Rep) 50; [1988] 1 MLJ 97, at 103-104; and

D (b) Richard Malanjum JCA's (as he then was) decision in the Court of Appeal case of *Arthur Anderson & Co v. Interfood Sdn Bhd* [2005] 2 CLJ 889; [2005] 6 MLJ 239, at para. 21;

(2) there is a second reason for applying for an *ex parte* APO. A plaintiff may
E apply for an *ex parte* APO to preserve any asset which forms the subject matter of the case (relevant asset) so as to prevent the relevant asset from being dissipated, destroyed, concealed or removed from the court's jurisdiction - please see Lai Siu Chiu J's judgment in the Singapore High Court in *BP Singapore Pte Ltd v. Quek Chin Thean & Ors* [2010] SGHC 358, at para. 42.

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I am aware that a party may apply for a court order to preserve a relevant asset under O. 29 r. 2 RC. However, O. 29 r. 2 RC does not expressly provide for a party to apply *ex parte* for an order to preserve a relevant asset. Hence, the importance of an *ex parte* APO to preserve
G a relevant asset from being dissipated, destroyed, concealed or removed from the court's jurisdiction pending the disposal of the action in question;

(3) the court has a statutory discretion to grant an APO (a form of temporary mandatory injunction) pursuant to the following provisions of written
H law -

(a) s. 51(1) of the Specific Relief Act 1950;

(b) s. 25(2) of the Courts of Judicature Act 1964 (CJA) read with para. 6 of the Schedule to CJA; and

I (c) O. 29 r. 1(1) RC

- please see *Pentamaster Instrumentation Sdn Bhd v. QAV Technologies Sdn Bhd & Ors* [2017] 5 CLJ 736; [2017] 11 MLJ 233, at para. 18. In view of the above provisions of written law, there is thus no need to resort to the court's inherent jurisdiction to grant an APO;

(4) the plaintiff has to apply *ex parte* for an APO because its purpose may be defeated if notice of such an application is given to the defendant - please see Lord Denning MR's judgment in *Anton Piller*, at p. 783.

Order 29 r. 1(2) RC allows an APO application to be made *ex parte* "where the case is one of urgency". In *Chin Wai Hong & Anor v. Lim Guan Hoe & Anor* [2014] 1 LNS 859; [2014] 5 AMR 427, at paras. 39, 40(a) and (b), I have opined as follows:

(a) if there is an urgency to hear an application for an interlocutory order, a plaintiff should apply to court under O. 3 r. 5(1) RC to abridge time for short service of the application on a defendant; and

(b) an *ex parte* application for an interlocutory order should only be made if the purpose of the interlocutory order may be defeated if an *inter partes* application is made;

(5) the court may exercise its statutory discretion to grant an *ex parte* APO if a plaintiff is able to satisfy the court of all the six following conditions (six conditions):

(a) the plaintiff has an extremely strong *prima facie* case against a defendant (extremely strong *prima facie* case requirement) - please see Ormrod LJ's judgment in *Anton Piller*, at p. 784.

There are certain cases which have seemingly applied a less stringent threshold than the extremely strong *prima facie* case requirement. For example, in the High Court case of *Lian Keow Sdn Bhd v. C Paramjothy & Anor* [1981] 1 LNS 26; [1982] 1 MLJ 217, at 219, Yusof Abdul Rashid J only required the plaintiff to show a "strong *prima facie* case" against a defendant. Abdul Malik Ishak J (as he then was) in the High Court in *Apparatech (M) Sdn Bhd v. Ng Hock Chong & Anor* [2006] 1 CLJ 60; [2006] 2 MLJ 61, at para. 28, required a "very strong *prima facie* case".

In *Arthur Anderson*, at sub-para. 31(a), the Court of Appeal has adopted the extremely strong *prima facie* case requirement. This is understandable in view of the draconian nature of an APO. It is to be noted that Chao Hick Tin JA in Singapore Court of Appeal in *Asian Corporate Services (SEA) Pte Ltd v. Eastwest Management Ltd (Singapore Branch)* [2006] 1 SLR 901, at para. 14, has also applied the extremely strong *prima facie* case requirement for the granting of an *ex parte* APO in Singapore;

(b) if the court does not grant an *ex parte* APO, the plaintiff may suffer very serious damage, actual or potential - please see Ormrod LJ's judgment in *Anton Piller* (at p. 784) and *Arthur Anderson* (at sub-para. 31(b)).

In *BP Singapore*, at paras. 37-45, Lai Siu Chiu J has explained that a plaintiff may suffer very serious "procedural damage" (loss of relevant evidence) or very serious "substantive damage" (loss of relevant asset) if an *ex parte* APO is not given by the court; and

(c) the relevant evidence/asset must be in the defendant's possession, custody, control or power - please see *Arthur Anderson*, at sub-para. 31(c);

(d) there is a "real possibility" that the defendant may:

(i) destroy or dissipate relevant evidence/asset;

(ii) conceal relevant evidence/asset; or

(iii) remove relevant evidence/asset out of the jurisdiction of Malaysian courts

- please see Ormrod LJ's judgment in *Anton Piller* (at p. 784) and *Arthur Anderson* (at sub-para. 31(c)).

"Real possibility" does not include "extravagant fears" as explained by Dillon LJ in the English Court of Appeal case of *Booker McConnell Plc & Anor v. Plascow & Ors* [1985] RPC 425, at 441;

(e) whether the effect of the APO would be disproportionate to its legitimate object - *Asian Corporate Services (SEA) Pte Ltd*, at paras. 14 and 35; and

(f) the affidavit in support of an *ex parte* APO application must comply with all the requirements stated in O. 29 r. 1(2A)(a) to (g) RC (procedural requirements). The court may set aside an *ex parte* APO solely on the ground that the procedural requirements have been breached by a plaintiff - *Arthur Anderson*, at paras. 44-48.

In considering the effect of a breach of the procedural requirements, I am of the view that the court should also bear in mind O. 1A RC (the court shall have regard to the "overriding interest of justice") and whether any breach of the procedural requirements is curable under O. 2 r. 1(1) and (3) RC; and

(6) whether the six conditions are fulfilled in a particular case, must depend on the evidence adduced in that case. Furthermore, the grant or decline of an APO in any case is an exercise of judicial discretion - *Arthur Anderson*, at para. 32. Accordingly, decided cases on APO cannot constitute binding legal precedents as a matter of *stare decisis*; and

(7) the court has a discretion to set aside an *ex parte* APO, upon an application by a defendant on the ground that the plaintiff has:

(a) failed to disclose a material fact in support of an *ex parte* APO application; or

(b) misrepresented or misled material facts to the court in the *ex parte* APO application

- please see the English Court of Appeal's judgment in *Brink's-Mat Ltd v. Elcombe & Ors* [1988] 3 All ER 188 and *Pentamaster Instrumentation* (at sub-paras. 40(2) to (5)).

Whether *Ex Parte* APO Should Be Set Aside

Whether Plaintiffs Had Failed To Disclose Material Facts In Obtaining Ex Parte APO

[8] Whether a material fact should be disclosed by a plaintiff in an *ex parte* APO application depends on an objective test of whether the court should consider such a fact in deciding whether to give an *ex parte* APO or not - please see the Singapore Court of Appeal case of *The Vasiliy Golovnin* [2008] 4 SLR 994 and *Pentamaster Instrumentation* (at sub-paras. 40(3) and (4)).

[9] The first defendant had contended that the plaintiffs had failed to disclose the following two material facts to the court in obtaining the *ex parte* APO (two facts):

(i) the first defendant had sent a WhatsApp message to Mr Foo at 3.17pm, 29 March 2017 which stated, among others:

> Dear Mr. Foo, as I came out of your office I was inform *[sic]* of the situation with PT Medisafe progress. Just to clear doubts. *That has nothing to do with me or my resignation. I sincerely appreciate what you have told me. I will uphold my R&D integrity. This is what I advocated to all the chemist [sic] I hired.*
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> (emphasis added); and

(ii) by way of an email dated 26 April 2017, the first plaintiff had allowed the early release request.

[10] I am of the view that based on an objective assessment, the court should consider the two facts in deciding whether to give the *ex parte* APO or not in this case. Accordingly, the two facts are material in this case and the plaintiffs should have disclosed the two facts to this court in their application for the *ex parte* APO.

Have Plaintiffs Satisfied Extremely Strong Prima Facie Case Requirement?

[11] The SOC has pleaded the following causes of action (plaintiffs' causes of action):

(a) in respect of the confidential information, the first defendant had breached his duty of confidence, trust, good faith and fidelity owed by him to the plaintiffs and plaintiffs' group by reason of the employment contract and CDNA (first defendant's breaches); and

(b) the second defendant had knowingly assisted in the first defendant's breaches and had unlawfully interfered with the business of the plaintiffs and plaintiffs' group by:

(i) inducing the first defendant to leave the plaintiffs; and

(ii) employing the first defendant.

[12] In the Federal Court case of *Dynacast (Melaka) Sdn Bhd & Ors v. Vision Cast Sdn Bhd & Anor* [2016] 6 CLJ 176, at para. 31, Richard Malanjum CJ (Sabah & Sarawak) followed Megarry J's (as he then was) decision in the English High Court in *Coco v. AN Clark (Engineers) Ltd* [1969] RPC 41, at 46-47, that the tort of breach of confidence has the following three elements:

(i) the information in question must have the necessary quality of confidence;

(ii) the information must have been imparted in circumstances importing an obligation of confidence; and

(iii) there must be an unauthorised use of the confidential information to the detriment of the party communicating it.

[13] It is clear from *Dynacast (Melaka) Sdn Bhd* that for a plaintiff to prove a tort of breach of confidence, the plaintiff has to specify the confidential information in question. In fact, all the plaintiffs' causes of action against both defendants depend on the contents of the confidential information. The plaintiffs are also required to specify the confidential information so as to enable the defendants to prepare their defence against this action.

[14] The following cases have required a plaintiff to specify the confidential information in question:

(a) the Federal Court has decided as follows in *Dynacast (Melaka) Sdn Bhd*, at paras. 28 and 29:

> [28] *While it is true that the claim of the plaintiffs is only to enforce the contractual clauses related to confidential information entered and agreed upon by the second defendant we do not think it is sufficient in the statement of claim by merely stating that the second defendant had 'misappropriated the private and confidential information of the plaintiffs'.*
>
> [29] *Surely more particulars should have been given on the alleged misappropriated private and confidential information. The second defendant is entitled to know what are the private and confidential information alleged to have been misappropriated by him. It would then allow him to contest the claim of privacy and confidentiality of those information. …*
>
> (emphasis added);

(b) Hamid Sultan Abu Backer JCA held as follows in the Court of Appeal case of *China Road & Bridge Corporation & Anor v. DCX Technologies Sdn Bhd* [2014] 7 CLJ 644, at paras. 23 and 32:

> [23] … *Very importantly in the instant case the identification of the 'confidential information' or for that matter 'information' has not been met. (See John Zink Co Ltd v. Wilkinson* [1973] FSR 1). …
>
> …
>
> [32] *To trigger cl. 7 of the 'memorandum' it is essential to disclose by way of pleadings what 'information' which was disclosed was breached. We have perused the pleadings several times but we were not able to identify the precise 'information' which was said to be breached. The word 'information' has a specific meaning and jurisprudence. All statements or correspondence made by the plaintiff will not qualify as 'information'. Neither will a part of the proposal per se will qualify as information. In addition, 'information' per se will not be entitled to 'confidential' status in relation to the memorandum. The statement of claim should define with some precision the information or communication which is alleged to be confidential. (See Diamond Stylus Co Ltd v. Bauden Precision Diamonds Ltd [1972] FSR 177). … In essence, the trial court must first identify the 'information' which has the characteristic of confidentiality and then proceed to consider whether the exception stated in cl. 7 will apply and then proceed to consider whether there was a breach. We have perused the judgment of the learned trial judge several times but we were not able to identify the finding on the 'information', whether it had the characteristic of confidentiality and whether it was breached. Failure to do so will necessarily compromise the integrity of the decision-making process and the judgment will stand as perverse. All subsequent findings resulting from the failure will have no value to the decision-making process itself.* …
>
> (emphasis added); and

(c) in *Ganesh Raja Nagaiah & Ors v. NR Rubber Industries Sdn Bhd* [2017] 4 CLJ 420, at paras. 7 and 11(a), Hamid Sultan Abu Backer JCA delivered the following judgment of the Court of Appeal:

> [7] *It is well settled that the courts whether in contractual or equitable claim relating to confidential information places much emphasis on the nature of information as well as its breach.* …
>
> …
>
> 11(a) *We have checked the pleadings several times to ascertain the nature of information which the respondent claims was breached. We have also checked the judgment of the learned trial judge to ascertain his finding as to the nature of information which was breached. There was none. Failure to identify the nature of information which can be clothed with the jurisprudence relating to intellectual property to give protection to the plaintiff is a grave omission by the learned trial judge which not only compromises the integrity of the decision-making process but also on the face of record makes the judgment sterile.*
>
> (emphasis added).

[15] The SOC and the plaintiffs' affidavit in support of the *ex parte* APO application did not specify the contents of the confidential information. At the *inter partes* hearing of encl. 4, I asked the plaintiffs' learned counsel regarding the plaintiffs' failure to particularise the confidential information (upon which the plaintiffs' causes of action are based). In response to my query, the plaintiffs' learned counsel undertook to amend the SOC and specify the confidential information.

[16] Based on the appellate cases elaborated in the above para. 14 (which are binding on me as a matter of *stare decisis*), there was no evidence before this court regarding the contents of the confidential information. Accordingly, the plaintiffs have failed to satisfy the extremely strong *prima facie* case requirement - please see *Anton Piller* and *Arthur Anderson*. On this ground alone, the *ex parte* APO should be set aside.

Should Court Exercise Discretion To Set Aside Part Or Entire Ex Parte APO?

[17] I have decided to exercise my discretion to set aside the entire *ex parte* APO because of one or both of the following reasons:

(i) as explained in the above paras 11 to 16, the plaintiffs have not satisfied the extremely strong *prima facie* case requirement; and/or

(ii) the plaintiffs have concealed two facts (please see the above paras 8 to 11).

Effect Of Setting Aside Ex Parte APO

[18] Upon the setting aside of the *ex parte* APO:

(i) I ordered an assessment of damages to be conducted by the Registrar (assessment) regarding all loss suffered by defendants due to the execution of the *ex parte* APO (assessed damages) - please see *Arthur Anderson* (at para. 51) and *Pentamaster Instrumentation* (at sub-para. 59(a)];

(ii) the assessment shall only be conducted after the trial of this suit. This is to expedite an early disposal of this case - *Pentamaster Instrumentation*, at sub-para. 59(b);

(iii) the plaintiffs shall pay to the defendants interest at the rate of 5% per annum on the assessed damages from the date of assessment until the date of the plaintiffs' full payment of the assessed damages;

(iv) costs of the assessment shall be assessed by the Registrar and shall be paid by the plaintiffs to the defendants; and

(v) no exemplary damages were awarded to the defendants because the plaintiffs and supervising solicitors did not enter the defendants' premises in this case.

Whether Court Should Grant *Inter Partes* APO

[19] Even though the entire *ex parte* APO has been set aside (please see the above paras 17 & 18), the court is duty-bound to consider afresh the *inter partes* APO application without being influenced by the setting aside of the *ex parte* APO - please see *Pentamaster Instrumentation*, at para. 48.

[20] I have exercised my discretion to dismiss the *inter partes* APO application. This exercise of discretion is premised on any one or more of the following three reasons:

(i) the plaintiffs have not satisfied this court of the extremely strong *prima facie* case requirement (please see the above paras 11 to 16);

(ii) there was no "real possibility" of destruction and/or concealment of relevant evidence by the defendants. This is because despite obtaining the *ex parte* APO, the plaintiffs had chosen not to enter the defendants' premises to search for and to seize relevant evidence. In other words, the plaintiffs admitted by their own conduct that there was no real possibility of the defendants destroying and/or concealing relevant evidence; and/or

(iii) if this court were to grant an *inter partes* APO, its effect would be wholly disproportionate to its legitimate object. Firstly, an *inter partes* APO would enable the plaintiffs to embark on a "fishing expedition" to obtain evidence to bolster this suit when the plaintiffs had failed to specify the confidential information and had chosen not to enter the defendants' premises to search for and to seize relevant evidence. Secondly, the second defendant has its own trade secrets and other confidential information. An *inter partes* APO may be unjust to the second defendant by compelling the second defendant to disclose its own confidential information to its competitors, the plaintiffs.

Should Court Grant Interlocutory Mandatory Injunctions Against First Defendant?

[21] The following decisions of our apex courts have held that a plaintiff who has applied for an interlocutory mandatory injunction, should satisfy the court that the plaintiff has an "unusually strong and clear case" against the defendant (not merely to raise a *bona fide* and serious question to be tried):

(i) Syed Agil Barakbah SCJ's judgment in the Supreme Court case of *Tinta Press Sdn Bhd v. Bank Islam (M) Bhd* [1987] 1 CLJ 447; [1987] CLJ (Rep) 396; [1987] 2 MLJ 192, at 193-194; and

(ii) the decision of Lamin Mohd Yunus FCJ (as he then was) in the Federal Court in *Karuppannan Chellapan v. Balakrishnen Subban* [1994] 4 CLJ 479, at 487.

[22] Regarding the prayers in encl. 4 for *inter partes* interlocutory mandatory injunctions to compel the first defendant to deliver confidential information and other certain information to the plaintiffs, I exercise my discretion to refuse such prayers. This is because the plaintiffs had failed to specify the confidential information in this case (please see the above paras. 11-16). Hence, the plaintiffs have failed to satisfy the court of an unusually strong and clear case against the first defendant which would entitle the plaintiffs to the interlocutory mandatory injunctions.

Should First Defendant Be Restrained In Respect Of Confidential Information Pending Disposal Of Suit?

[23] On the *inter partes* hearing of encl. 4, the plaintiffs' learned counsel informed the court that the plaintiffs would not apply for an interlocutory injunction to restrain the second defendant from disclosing, divulging, using, communicating, disseminating and publishing the confidential information pending the disposal of this suit. The plaintiffs would only seek such an interlocutory prohibitory injunction against the first defendant.

[24] It is trite law that a plaintiff who applies for an interlocutory restraining injunction is only required to satisfy the court that there is at least one *bona fide* and serious question to be tried in respect of the plaintiff's cause of action against the defendant - please see the Supreme Court's judgment delivered by Mohd Jemuri Serjan CJ (Borneo) in *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v. Sey Hoe Sdn Bhd & Ors* [1995] 1 CLJ 461; [1995] 1 MLJ 241, at 253.

[25] In this case, the plaintiffs' failure to specify the confidential information (please see the above paras. 11-16) meant that the plaintiffs had failed to satisfy the court that there is at least one *bona fide* and serious question to be tried in respect of the plaintiffs' causes of action. On this ground alone, I exercise my discretion to dismiss the plaintiffs' *inter partes* application for an interlocutory prohibitory injunction against the first defendant.

Costs Of Three Applications

[26] Order 59 rr. 2(2), 3(1), (2), 8(b) and 21 RC provide as follows:

> r 2(2) *Subject to the express provisions of any written law and of these Rules, the costs of and incidental to proceedings in the Court, shall be in the discretion of the Court, and the Court shall have full power to determine by whom and to what extent the costs are to be paid.*
>
> r 3(1) *Subject to the following provisions of this Order, no party shall be entitled to recover any costs of or incidental to any proceedings from any other party to the proceedings except under an order of the Court.*
>
> r 3(2) *If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.*

Special matters to be taken into account in exercising discretion

r 8. *The Court in exercising its discretion as to costs shall, to such extent, if any, as may be appropriate in the circumstances, take into account*:

…

(b) *the conduct of all the parties, including conduct before* and during *the proceedings*; …

Costs for interlocutory applications (High Court)

r 21. *The amount of costs payable upon the conclusion of any interlocutory application, other than those falling within the ambit of rule 22 shall be at the discretion of the Court, but in fixing the amount of costs, the Court shall have regard, inter alia, to the factors set out in rule 16.*

(emphasis added).

[27] Order 59 r. 22 RC does not apply to the three applications.

[28] The general rule is that "costs to follow the event" (O. 59 r. 3(2) RC), namely the court should generally exercise its discretion to award costs of an action or application to the winning party. The court, however, has a discretion to deprive the winning party of costs of the suit or application, wholly or partly - please see *La Kaffa International Co Ltd v. Loob Holdings Sdn Bhd* [2017] 6 MLRH 33, at paras. 48 and 49.

[29] Although the first defendant has succeeded in respect of encl. 4 and 21, I have decided to exercise my discretion under O. 59 rr. 2(2), 3(1), (2), 8(b) and 21 RC to deprive him of the costs of encl. 4 and 21. This exercise of discretion is due to the first defendant's conduct in lying, not once but twice, to Mr Prabha and Mr Foo regarding his reasons for leaving the first plaintiff. The first defendant had the right not to give any reason for his resignation but if he chose to give reasons for leaving the first plaintiff, he should not have given untrue reasons.

[30] In accordance with O. 59 rr. 16 and 21 RC, I exercise my discretion to order the plaintiffs to pay RM50,000 to the second defendant as costs for encl. 4 and 15. Such an exercise of discretion is based on the following reasons:

(i) the complex nature of encls. 4 and 15 which concerns APO and confidential information (please see O. 59 r. 16(1)(a) RC);

(ii) the skill, specialised knowledge and responsibility required of the second defendant's learned counsel, a senior member of the Malaysian Bar (please see O. 59 r. 16(1)(b) RC); and

(ii) the importance of this case to the second defendant (please see O. 59 r. 16(1)(e) RC).

A **Enclosure 100**

[31] Order 21 r. 3(1) RC provides as follows:

> r 3(1) Except as provided by rule 2, **a party may not discontinue an action** (whether begun by writ or otherwise) or counterclaim, or withdraw any particular claim made by him therein, **without the leave of the Court, and the Court hearing an application for the grant of such leave may order the action or counterclaim to be discontinued**, or any particular claim made therein to be struck out, **as against any or all of the parties against whom it is brought or made on such terms as to costs, the bringing of a subsequent action or otherwise as it thinks just**.
>
> (emphasis added).

[32] When a plaintiff applies under O. 21 r. 3(1) RC for the court's leave to discontinue an action (discontinuance application), the court has the following discretion:

(i) whether to grant leave for the discontinuance application (leave to discontinue) or otherwise. In the following cases, the discontinuance applications have been dismissed:

(a) in *Majlis Peguam Malaysia & Ors v. Raja Segaran S Krishnan* [2002] 3 CLJ 370, at 378, Gopal Sri Ram JCA (as he then was) in the Court of Appeal reversed the High Court's leave to discontinue on the ground that the defendants were exercising their constitutional right of freedom of speech and had resisted that suit "tooth and nail"; and

(b) in the High Court case of *Overseas Union Finance Ltd v. Lim Joo Chong* [1971] 1 LNS 101; [1971] 2 MLJ 124, the finance company was a National Land Code (NLC) chargee of land belonging to the defendant. The finance company applied to court for an order for sale of the charged land under the NLC. The defendant had raised, among others, a defence that the NLC charge was illegal and void. Raja Azlan Shah J (as His Majesty then was), at pp. 125-126, disallowed the discontinuance application because if that suit was discontinued, the defendant would be deprived of certain "advantages" in that suit regarding the validity of the NLC charge; and

(ii) if leave to discontinue is given, the court has a discretion to impose the following terms (discontinuance terms):

(a) whether the plaintiff should be granted liberty or not to file a subsequent action against the defendant based on the same cause of action as in the discontinued action.

The following cases have explained that when the court grants leave to discontinue, a party may generally be given the liberty to the plaintiff to file a subsequent action against the defendant based on the same cause of action as the discontinued action (liberty to file afresh) -

(i) the Court of Appeal's judgment delivered by Zabariah Mohd Yusof JCA in *Newlake Development Sdn Bhd v. Zenith Delight Sdn Bhd & Ors* [2017] 1 LNS 527; and

(ii) VC George J's (as he then was) decision in the High Court case of *United Asian Bank Bhd v. Balakrishnan Thanakodi & Ors* [1992] 1 CLJ 522; [1992] 3 CLJ (Rep) 742, at 744-745.

There are exceptional cases which have allowed discontinuance applications subject to the term that the plaintiff cannot institute a fresh action against the defendant based on the same cause of action as the discontinued action (no liberty to file afresh) - please see Ahmad Fairuz JCA's (as he then was) judgment in the Court of Appeal in *Ng Hee Thoong & Anor v. Public Bank Bhd* [2000] 1 CLJ 503 and Lim Beng Choon J's decision in the High Court case of *Hanhyo Sdn Bhd v. Marplan Sdn Bhd & Ors* [1991] 3 CLJ 1783; [1991] 2 CLJ (Rep) 684. The party who applies for no liberty to file afresh has the burden to satisfy the court that there is an exceptional ground for the court to impose such a discontinuance term; and

(b) the court may order costs of the action to be paid by the plaintiff to the defendant. The court may even exercise its discretion to order each party to bear its own costs - please see the judgment of Chong Siew Fai J (as he then was) in the High Court in *Hongkong & Shanghai Banking Corp v. Timor Electric Cable & Wire Sdn Bhd &* Ors [1991] 3 CLJ 1794; [1991] 2 CLJ (Rep) 728.

[33] I am of the view that decisions on leave to discontinue and discontinuance terms depend on the exercise of judicial discretion based on the particular facts and circumstances of each case. Accordingly, cases on discontinuance applications cannot be binding precedents from the viewpoint of the *stare decisis* doctrine.

[34] Regarding encl. 100, I exercise my discretion under O. 21 r. 3(1) RC to grant leave to discontinue because:

(i) enclosure 100 had been made in good faith. There is no evidence adduced by the second defendant to show that encl. 100 has been filed with an ulterior motive or an improper purpose to obtain a collateral advantage *vis-a-vis* the second defendant;

(ii) the second defendant will not suffer any injustice if leave to discontinue is granted. There is no evidence that the second defendant will be deprived of any advantage or defence if the court allows encl. 100;

(iii) this action against the second defendant is not at an advanced stage; and

(iv) the second defendant did not object to the granting of leave to discontinue. The second defendant only contended that no liberty to file afresh should be imposed on the plaintiffs.

[35] Leave to discontinue is granted to the plaintiffs subject to the following discontinuance terms:

(i) this court exercises its discretion to grant liberty to file afresh based on the following reasons:

(a) if the court orders no liberty to file afresh, this will cause an injustice to the plaintiffs if the plaintiffs subsequently discover evidence that the second defendant is liable to the plaintiffs for the same causes of action as pleaded in this case. It is to be noted that the first defendant is still employed by the second defendant; and

(b) there is no injustice to the second defendant if liberty to file afresh is given to the plaintiffs. This is because the second defendant is not barred from raising any defence to resist a subsequent suit by the plaintiffs based on the same causes of action raised in this case. In any event, the second defendant has failed to show any prejudice which may be suffered by the second defendant as a result, directly or otherwise, of the granting of liberty to file afresh. In the circumstances, the second defendant has failed to discharge the onus to persuade the court that there is an exceptional ground in this case for the court to order no liberty to file afresh;

(ii) costs of RM5,000 shall be paid by the plaintiffs to the second defendant; and

(iii) to ensure that the trial of this action against the first defendant (trial) is not delayed, I order the assessment to be conducted after the trial.

Court's Decision

[36] In summary:

(i) enclosure 15 and 21 are allowed - the *ex parte* APO is set aside in its entirety;

(ii) enclosure 4 is dismissed;

(iii) as between the plaintiffs and the first defendant, there will be no order as to costs regarding encl. 4 and 21;

(iv) as between the plaintiffs and the second defendant, plaintiffs shall pay RM50,000 to second defendant as costs for encl. 4 and 15. An allocatur fee is imposed on this sum pursuant to O. 59 r. 7(2) RC; and

(v) enclosure 100 is allowed on the following terms:

(a) the plaintiffs are given liberty to file afresh;

(b) costs of RM5,000 shall be paid by the plaintiffs to the second defendant; and

(c) the assessment shall be conducted after the trial.

[37] In closing, an employee has the right to resign from his or her employment. An employee also has the right to give reasons or may even opt to remain silent on why he or she has resigned. If an employee however gives an untrue excuse for leaving his or her employment, such a conduct may have severe and adverse legal consequences (as in this case). Hence, the first defendant in this case should be admonished (in terms of deprivation of costs) for giving less than honest answers for his resignation.